No. 49251-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In Re the Personal Restraint of

STEVEN L. HESSELGRAVE,

Petitioner.

PERSONAL RESTRAINT PETITION

AND REPLY BRIEF IN SUPPORT

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STATUTE

Steven L. Hesselgrave, through his counsel Cynthia B. Jones and Rita Griffith, petitions for relief from personal restraint on the grounds and for the reasons set out below and in his Personal Restraint Petition and Opening Brief in Support.

A. STATUS OF PETITIONER

The state, in its Response to Personal Restraint Petition in this case, affirms the status of Mr. Hesselgrave, as set out in the petition, and does not challenge the timeliness of the petition. Response 1-2.

B. FACTS RELEVANT TO ALL GROUNDS FOR RELIEF

The state does not present any statement of facts in its Response and does not challenge any of the facts set out in Mr. Hesselgrave's PRP and Opening Brief. The facts set out in the Personal Restraint Petition should therefore be treated as undisputed.

C. REPLY TO PROCEDURAL CHALLENGES

1. THE STATE'S CLAIM THAT MR HESSELGRAVE CANNOT RAISE A CONSTITUTIONAL ISSUE IN A PRP BECAUSE IT COULD HAVE BEEN RAISED ON APPEAL IS IN CONFLICT WITH IN RE HEWS.

The state implies that the rule of law in Washington is that issues which might have been presented on direct appeal, but were not, cannot be

raised for the first time in a PRP.[1] Response 2-3 This is contrary to In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983), which held that failure to raise a constitutional issue on direct appeal does not preclude consideration of the issue when raised in a PRP. A petitioner who suffers actual prejudice can challenge an error in a PRP. Hews, 99 Wn.2d at 87. The court, in Hews, emphasized that the only grounds for relief barred were those which had been "heard and determined" in the prior appeal.

In In re Hegney, 138 Wn. App. 511, 158 P.3d 1193 (2007), a case cited by the state, the court considered challenges to the "to-convict" instructions – challenges which could have been raised on direct appeal, but weren't – and considered an issue which was raised on direct appeal, The Court considered the issue again because it had not considered the issue in light of Crawford v. Washington,541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), even though Crawford had been decided prior to the issuance of that earlier decision on appeal.

The state, in fact, cites no case in which an appellate court refused to consider an issue because it could have been, but was not, raised on direct appeal. Nor does the language quoted from In re Personal Restraint of Gentry. 137 Wn.2d 378, 388-389, 972 P.2d 1250 (1999), a "collateral

[1] "THE PETITIONER ARGUES ISSUES WHICH COULD HAVE BEEN PREVIOUSLY RAISED IN THE DIRECT APPEAL" Response 2.

attack . . . . [should] raise new points of fact and law that were not or could not have been raised in the principal action," require such refusal. (emphasis added). This language permits consideration of issues which either were not raised on appeal or could not have been raised on appeal.

The state further argues that Mr. Hesselgrave cannot challenge the prosecutor's use of highly inflammatory illustrations and interjection of personal opinions before the jury because he "raised the issue of the closing argument" in his appeal. Response at 3-4. Appellate counsel, however, challenged the state's legal theory of its case as it was presented during closing argument, a "distinct legal basis for granting relief" from the basis presented in the PRP.[2] State v. Brown, 154 Wn.2d 787, 794, 117 P.3d 336 (2005).

Assuming, however, without conceding, that appellate counsel raised the PowerPoint issue on direct appeal by challenging the prosecutor's "false choice" argument, then counsel was ineffective for failure to properly raise the issue and cite highly relevant and controlling authority to the issue. See PRP and Supporting Brief 19-20.

Finally, the mere fact that an issue has been raised on appeal does not automatically bar re-raising the issue in a personal restraint petition. In re Vandervlugt, 120 Wn.2d 427, 432, 842 P.2d 950 (1992). An issue

[2] No authority is presented that "closing argument" is a grounds for relief.

should be revisited if the ends of justice would be served by doing so. Id. The ends of justice may be served under several circumstances, including that the earlier decision was incorrect and the issue constitutional. In re Percer, 111 Wn. App. 843, 864, 47 P.3d 576 (2002), aff'd on this point of law, 150 Wn.2d 41, 75 P.3d 488 (2003).

The grounds for relief presented in the PRP may properly be considered by this Court.

2. THE STATE SETS OUT THE WRONG STANDARD FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The state agrees that the test for ineffective assistance of counsel on appeals is the test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct, 2052, 145 L. Ed. 2d 756 (1984). Response 15. The state, however, erroneously asserts that to prevail on a claim of ineffective assistance of counsel "the defendant must show that 'but for counsel's errors the outcome of the proceedings would have been different.'" Response at 14. This is incorrect.

In Strickland, the United States Supreme Court held that "the proper standard for attorney performance is that of reasonably effective assistance." The Court held, more specifically, that to sustain a claim of ineffective assistance of counsel the accused need only make two showings:

> First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that

the deficient performance prejudiced the defense.

In determining the prejudice of defense counsel's deficient performance, the defendant need only show a "reasonable probability" that counsel's performance prejudiced the outcome; the defendant "*need not show that counsel's deficient conduct more likely than not altered the outcome of the case.*" Strickland, at 695 (emphasis added).

D. GROUNDS FOR RELIEF

FIRST GROUND: MR. HESSELGRAVE WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR USED HIGHLY INFLAMMATORY ILLUSTRATIONS AND INJECTED PERSONAL OPINIONS DURING CLOSING ARGUMENT.

The government states on page 8 of its Response that the prosecutor did not alter evidence by adding subscript or argument to the *photographs* admitted into evidence "which the Glassman and Davis Courts found improper." [emphasis added]. The government misses the point of the holdings.

Any evidence – photographic or not -- that is altered by the prosecutor and then presented to the jury in the form of a highly charged visual presentation is improper. See In re Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Walker, 182 Wn.2d 463,

341 P.3d 976 (2015); PRP and Brief in Support 7-20; Response Appendix D – photocopy of slide show.

Here, the prosecutor altered SL's testimony – which is evidence for the jury to weigh. The prosecutor, for example, paraphrased SL"s testimony and altered the emphasis of it to conjure up a sinister picture not present in the original: "didn't see the defendant come to wake her up. . . .HEARD HIS FOOTSTEPS." Appendix 4. It was improper for the prosecutor to alter the testimony and present it in a slide show to the jury.

Further, "[a] '[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office…and the expression of his own belief of guilt into the scales against the accused.'" In re Pers. Restraint of Glasmann, 175 Wn.2d at 704 (internal citations omitted). The prosecutor did this in presenting a slide to the jury indicating that it was "impossible" to reach any verdict other than guilty. The prosecutor violated the holdings of Glassmann and Walker.

Further, the government argues the prosecutor's use of the word "Guilty" in the slide show presentation is not an improper expression of personal opinion. Response at 7. However, the slide speaks for itself. See

Response Appendix D. In fact, like Glassmann and Walker, the prosecutor here showed the "Guilty" slide at least three separate times to the jury.[3]

In State v. Walker the Supreme Court said "The prosecutor's duty is to seek justice, not merely convictions." 182 Wn.2d 463, 476, 341 P.3d 976 (2015). The court added that the number of slides "depicting statements of the prosecutor's belief as to the defendant's guilt, shown to the jury just before it was excused for deliberations, is presumptively prejudicial and may in fact be difficult to overcome, even with an instruction." Id. at 479.

As argued at length in the PRP and Brief in Support, the visual display of the slides accompanying the prosecutor's words renders the PowerPoint slides unfair – the prosecutor repeatedly expressed his personal opinion about the credibility of witnesses – a decision that must be left in the exclusive hands and minds of the jurors. The slide show was prejudicial and in keeping with Glassman and Walker, Mr. Hesselgrave's conviction must be reversed.

[3] See Affidavit of Steven Hesselgrave to follow.

SECOND GROUND: THE PROSECUTOR'S COMMENT ON MR. HESSELGRAVE'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION OF WITNESSES DENIED HIM THESE RIGHTS AND A FAIR TRIAL.

The prosecutor at trial improperly commented on Mr. Hesselgrave's exercise of his constitutional rights to counsel and confrontation and argued that he should be found guilty and the complaining witness SL should be found credible because he exercised them. The prosecutor asked the jurors to consider SL's demeanor in court in light of the fact that there were "two lawyers asking a ten-year-old every questions they can think of." RP 921. The prosecutor continued by arguing that the questioning went on for "hours on end," which was found objectionable, and then by arguing that the examination lasted for one to two hours. RP 932. The prosecutor continued by describing SL as nervous and scared when she testified "with her little cush ball," reference to which had been excluded. RP 936. Further, the prosecutor elicited from SL that she did not wish to look at Mr. Hesselgrave during trial, and then reminded the jury of this in argument. RP 936. The prosecutor described SL as hiding behind the counter when testifying to avoid having to see Mr. Hesselgrave. RP 936.

In responding, the state discussed only the prosecutor's statement that there were "two lawyers asking a ten-year-old every question they can think of"; and argued that this one statement was merely meant to explain why SL's disclosures became more detailed over time. Response at 8. First, contrasting the lawyers using their positions and wiles with the "ten year old" was simply not meant to explain only that SL's disclosures were more detailed because she was asked more questions in court. In context, the prosecutor was trying to explain why SL's disclosures were more detailed during the safety and forensic interviews and to ask the jury to find her credible because she was frightened and intimidated by counsel and Mr. Hesselgrave while testifying during trial. RP 931-936. The prosecutor was clear about this:

> She didn't want to look. Does that look like somebody who wants to throw someone under the bus? No. That is somebody that is honestly freaked out that their father figure did this to them and they have to sit here and tell 12 strangers about it.

RP 936 (emphasis added). In other words, SL is credible and Mr. Hesselgrave guilty because he exercised his trial rights and forced SL to face a lengthy examination where the lawyers asked her "every question they counsel think of" for "hours on end." This and being afraid because she had to sit in court, look at Mr. Hesselgrave, and testify before twelve jurors in court proved that she was credible and he was guilty.

As set out in the Brief in Support, the state may not ask the jury to draw negative inferences from the accused's exercise of a constitutional right. To allow this would penalize him for lawfully exercising that constitutional right. See cases cited in PRP and Brief in Support 22-23. In this case, the improper comments, more likely than not, actually and substantially prejudiced Mr. Hesselgrave. SL's credibility was the central issue at trial, and the prosecutor's picture of her holding onto her little cush ball for comfort while she was grilled by hours by counsel and had to face Mr. Hesselgrave in court surely resulted in substantial and actual prejudice. See PRP and Brief in Support 24-25.

THIRD GROUND: THE OPINION TESTIMONY THAT THE COMPLAINING WITNESS HAD NOT BEEN COACHED UNCONSTITUTIONALLY COMMENTED ON THE CREDIBILITY OF A WITNESS AND MR. HESSELGRAVE'S GUILT.

At trial, the prosecutor asked the state's forensic interviewer Cornelia Thomas if she was "trained to be alert for coaching," RP 673, and elicited from Thomas an example of a witness who had not been coached -- "[a]s an example of that [adding details] is if a child said – maybe made a disclosure of oral sex and then the child said, 'Ooh, and then I had to drink it,'" which described a disclosure and comment that SL made during the interview shown to the jury. RP 675, 680.

After playing the interview, the prosecutor then elicited from Thomas that she did not see any "evidence or indications" of coaching. This testimony was meant to and did convey to the jury, Thomas's expert opinion that SL's disclosures were not a product of coaching – one of the primary theories of the defense. The prosecutor emphasized in closing that Thomas had done 1,500 interviews and said she saw no evidence of coaching. RP 672-675. In this way, the prosecutor clearly asked the jury to find Mr. Hesselgrave guilty and SL credible because Thomas found no evidence that SL had been coached.

In spite of this, the state argues in its response that "Ms. Thomas did not comment or opine on whether S.L. had been coached," and that her testimony was "content neutral." Response at 11. The state relies on the decision in State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007), which held that a doctor's testimony that finding no physical evidence of sexual contact -- after disclosures such as those made by the complaining witness in the case -- was the norm, not the exception, was "content neutral." But Mr. Hesselgrave's case is distinguishable; it is not like the testimony in Kirkman. In Kirkman, the doctor was merely testifying to his experience that there is more often than not, no physical evidence of abuse after disclosure of a certain type of abuse. The doctor's testimony did not assume the truth of the disclosure allegations, nor was it based on any

theory; it was based on the fact that there was a reported disclosure and the absence of physical findings.

In contrast, Thomas's testimony not only assumed that there was an accepted theory which would allow her to determine whether a witness had been coached – because they were robotic in their disclosures-- but that a specific comment SL made during the interview established that she had not be coached and was inferentially more credible in her accusations. RP 674. Her testimony was not "content neutral"; Thomas's testimony that she could tell SL's accusations were uncoached and spontaneous was an impermissible comment on guilt and credibility. Her testimony would be akin to the doctor's testifying in Kirkman that the absence of physical evidence made it more likely that disclosures were credible and that she had not been coached in making them.

As set out in the PRP and Brief in Support (29-31), prosecutors may not ask a witness to comment on the credibility of another witness and that doing so invades the province of the jury and denies due process. Such a comment may constitute a manifest constitutional error. As set out in the PRP and Brief in Support (32), Thomas's testimony that a forensic interviewer can tell that a child has or has not been coached was not shown to be based on any reasonable scientific principles and was improper for that reason.

Further, the state's reliance on the fact that defense counsel cross-examined Thomas about coaching, shows only that counsel was forced to try to mitigate the unfair prejudice of Thomas's direct testimony that SL had not been coached to accuse Mr. Hesselgrave.

SL's credibility was the primary issue for the jury. The prosecutor devoted a substantial portion of the closing argument to the question of whether she was coached and told the jury that Thomas determined that she had not been. RP 943. The prosecutor told the jury to watch the interview again and remember Thomas's testimony. RP 945. The testimony surely influenced their decision, even though it was not based on any accepted theory and constituted an improper comment on credibility.

FOURTH GROUND: THE TRIAL COURT'S COMMENT ON THE EVIDENCE DENIED MR. HESSELGRAVE HIS RIGHT TO A JURY TRIAL UNDER THE WASHINGTON CONSTITUTION.

During voir dire, the judge asked a juror who had sat on a prior jury involving an arson case, if anyone had seen the fire set, and followed up with questions about whether this created a problem with the jury, whether the jury was instructed on circumstantial evidence and whether there "were jurors who said that they really needed to see someone who was there and saw it." RP 108. The judge then expressly said:

> That's actually often a problem in cases. There often aren't eyewitnesses. [There] aren't videotapes of a lot of things. In fact as you might imagine in child abuse cases, frequently there isn't a lot of eyewitness testimony.

RP 108.

Contrary to the state's argument, this was not a using an example raised by a jury; the judge introduced the issue by asking the prospective juror if anyone saw the fire being set. RP 108. Nor was it alerting jurors to the fact that the law might be different than their preconceptions. This was the trial judge telling the jurors that it would be a problem if they expected eyewitness testimony in a case which involved child abuse and were unwilling to convict on circumstantial evidence alone. In this way, the trial judge assumed the role of the prosecutor in the case and conveyed his personal attitude on the credibility, weight and sufficiency of the evidence to be introduced at trial. This constituted commenting on the evidence forbidden by Article 4, section 16 of the Washington State Constitution. See PRP and Brief in Support 37-38.

FIFTH GROUND: THE DIRECTIVE TO PAY LFO'S WAS BASED ON AN UNSUPPORTED FINDING OF ABILITY TO PAY; HENCE, THE MATTER SHOULD BE REMANDED FOR THE SENTENCING COURT TO MAKE INDIVIDUALIZED INQUIRY INTO MR. HESSELGRAVE'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LFOS INCLUDING COSTS OF INCARCERATION AND MEDICAL CARE

The government concedes the sentencing court failed to conduct an individualized determination of Mr. Hesselgrave's present and future ability to pay legal financial obligations (LFOs) in violation of State v. Blazina,182 Wn.2d 827, 344 P.3d 680 (2015); Response at 12. Then the government argues "defendant could not raise it in his direct appeal and he cannot raise it in this PRP." Response at 13. The government is wrong.

The government overlooks recent Washington Supreme Court precedent fully cited in the PRP and Brief in Support at 42-43.

Specifically, in State v. Duncan, the supreme court held that LFOs may be challenged for the first time on appeal and that the imposition and collection of LFOs *have constitutional implications and subject to constitutional limitations.* [emphasis added]. 185 Wn.2d 430, 436, 374 P.3d 83 (2016).

There, Duncan did not object at trial and raised the issue for the first time on appeal. Id. at 437. The Supreme Court then considered whether it should reach the issue:

> We reached this issue in Blazina because we found ample and increasing evidence that unpayable LFOs "imposed against indigent defendants" imposed significant burdens on offenders and our community, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." ...Given that, and given the fact that the trial courts had not made an individualized inquiry into the defendants' ability to pay before imposing the LFOs, we remanded to the trial court for new sentencing hearings. Consistent with our opinion in Blazina and our other cases decided since then, we remand to the trial court for resentencing with proper consideration of Duncan's ability to pay LFOs.

Id. at 437-38 (internal citations omitted).

Further, since Mr. Hesselgrave filed his PRP and Brief in Support, the Washington Supreme Court issued yet another opinion on September 22, 2016 reversing a lower court's order of LFOs against an indigent person. City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016).

Here, as in Duncan, Wakefield, and as argued in PRP and Brief in Support at 41-46, this court should reach the issue and remand consistent with Washington Supreme Court precedent.

The government also argues that relief from the LFOs may be sought under RCW 10.01.160(4). However, the trial court was under

obligation to conduct an individualized determination of the defendant's present and future ability to pay at the time the LFOs were imposed and as the State concedes, the court failed to do so. RCW 10.01.160(3). The relevant portion of the statute provides:

> The court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) [emphasis added].

The government concedes the trial court failed to do so. The remedy is for this court to remand to the trial court for a new sentencing hearing on both the trial and appellate costs as argued in PRP and Brief in Support at 41-45. Because Mr. Hesselgrave currently serves an indeterminate life sentence and may never be released, interest will continue to accrue on the LFOs when he has no opportunity to pay off or pay down the debt while incarcerated – debt that was placed on Mr. Hesselgrave without the benefit of the required determination by the trial court of his ability to pay – a failure conceded by the government in its Response.

SIXTH GROUND: THE DOMESTIC VIOLENCE FINDING SHOULD BE VACATED AND DISMISSED BECAUSE MR. HESSELGRAVE WAS NOT A STEPFATHER AT A TIME WHEN THE JURY COULD HAVE FOUND THE CRIME OCCURRED.

In closing argument, the prosecutor was clear that the state was not asking the jury to decide when the crime occurred:

> So, again, the time frames, they're not really in contention because all the time frames that we're talking about are within that time range on your checklist, so I'm not going to talk anymore about when this happened because it happened within the time range.

RP 930. Further, the court's instruction did not ask the jury to specify which occasion they agreed on for the conviction. Count's Instruction 6. Thus, the jury was not asked to and did not unanimously decide whether the crime happened when SL was living with Mr. Hesselgrave or when she spent the night at his apartment while her mother was at a bachelorette party. See RP 251, 652-653. He was SL's stepfather only on the earlier date. RP 373, 375-377, 867.

The state does not contest that Mr. Hesselgrave was not SL's stepfather at the time of the bachelorette party or address the argument that where it is possible that the jury found the domestic violence allegation proven when the evidence could not sustain the finding requires reversal.

It argues only that there was sufficient evidence that the crime occurred when he was her stepfather. Response at 13-14.

State v. Aho, 137 Wn.2d 737, 744, 975 P.3d 512 (1999), should be controlling. It held that "[b]ecause the jury did not identify when the acts that it found constituted the offenses occurred, it is possible that Aho has been illegally convicted based upon an act or acts occurring before the effective date of the child molestation statute. Aho's convictions for child molestation violates due process." The domestic violence allegation should be reversed and dismissed because the jury did not identify when the acts it found constituted the offense occurred, and it is possible that the jury found the allegation when Mr. Hesselgrave was not SL's stepfather.

REQUEST FOR RELIEF

For the reasons set forth above and in his Personal Restraint Petition and Brief in Support, Petitioner asks the Court to:

a. Grant his petition, reverse his conviction and remand his case for retrial.

b. Grant his petition and vacate and dismiss the domestic violence finding.

c. Grant his petition and remand his case for a determination of his ability to pay the legal financial obligations imposed after trial and direct appeal.

d. Grant Petitioner such other relief as is just and necessary to a full and fair adjudication of Petitioner's claims and this Petition.

DATED this 28th day of December, 2016.

Respectfully submitted,

_____/s/_____
Cynthia B. Jones, WSBA No 38120

_____/s/_____
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CERTIFICATE OF SERVICE

I certify that on the 28th day of December, I caused a true and correct copy of the Reply Brief of Petitioner to be served on the following:

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